1989

Fay Gaw v. State of Utah, et al. : Brief of Respondent

Utah Court of Appeals

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Robert J. Debry; attorney for appellant.

BRIEF

IN THE UTAH COURT OF APPEALS

FAY GAW,

Appellant,

vs.

STATE OF UTAH, et al.,

Respondents.

CATEGORY 14 B

BRIEF OF RESPONDENTS

Case No. 890139-CA

APPEAL FROM JURY VERDICT IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY, HONORABLE BOYD BUNNELL, PRESIDING, AND A RELATED APPEAL FROM A GRANT OF SUMMARY JUDGMENT

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Mary Noonan
Clerk, Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, UT 84102

Dear Ms. Noonan:

RE: Gaw v. Lingle - Case No. 890139-CA

As permitted by Rule 24(j) of the Utah Rules of Appellate Procedure, appellant replies briefly to Respondent's Memorandum of Newly Uncovered Authority (June 11, 1990).

Respondent argues that three other experts on accident reconstruction testified at the trial, and thus, there was no prejudice in striking a fourth expert.

It is true that three accident reconstruction experts did testify (Probert, Smith and Beaufort). However, the excluded witness was not an accident reconstruction expert at all. Rather, he was a human factors research scientist. (See Brief of Appellant at Point I.)

The testimony of the human factor's research scientist was completely different from the traffic accident reconstruction experts. (See Brief of Appellant at Point I(A).)

An analogy might be an airplane accident. Suppose that pilots have given expert testimony. Certainly that doesn't mean that mechanics are then excluded from giving expert testimony.

In this case, appellant sought to prove her case by putting on evidence from traffic accident reconstruction experts, as well as somewhat different evidence from a human factor's scientist. The ruling of the trial court excluded half of appellant's case.

Sincerely,

ROBERT J. DEBRY

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cc: Counsel of Record

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June 11, 1990

Mary T. Noonan, Clerk
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Salt Lake City, Utah 84102

Re: Gaw v. Lingle
Case No.: 890139-CA

Dear Ms. Noonan:

Pursuant to Rule 24(j) Utah Rules of Appellate Procedure, I advise of the case of Onyeabor v. Pro-Roofing, Inc., 128 Utah Adv. Rpt. 23 (CA 1990). Point II of that case at page 25, the last full paragraph pertains to Point I of Respondent's brief, in view of the fact that the expert mentioned in that point was one of four experts testifying on accident reconstruction and liability. The other experts were witnesses Probert, Smith, and Beaufort.

Thank you for your attention to this matter.

Yours truly,

HANSON, EPPERSON & SMITH

Robert R. Wallace

RRW/llh

(7 copies)

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October 3, 1989

Clerk of the Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Re: Gaw v. Lingle
Case No. 890139-CA

Dear Clerk:

Pursuant to Rule 24(j) the respondents call to the Court's attention the case of Ostler v. Albina Transfer Company, 117 Utah Adv. Rep. 14 (September 8, 1989), a decision of this Court, which relates to the admission or exclusion of expert testimony, and to the review of issues relating to jury instructions.

Respectfully submitted.

Yours truly,

HANSON, EPPERSON & SMITH

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IN THE UTAH COURT OF APPEALS

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PARTIES

1. Fay Gaw: Plaintiff/Appellant

2. Jimmy Wray Lingle: Defendant/Respondent

3. Roadrunner Trucking, a New Mexico Corporation: Defendant/Respondent

4. State of Utah by and through its Department of Transportation: Defendant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

JURISDICTION AND NATURE OF PROCEEDINGS

This court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j).

This is a negligence action in which a jury found the plaintiff 75% negligent for the accident in question. The appeal is from the judgment, no cause of action. A related appeal involves the grant of summary judgment to the defendant State of Utah.

STATEMENT OF THE CASE

Plaintiff Fay Gaw while turning left from a side street onto Highway 6 in Helper, Utah, drove into the path of a truck driven by defendant Jimmy Wray Lingle and owned by defendant Roadrunner Trucking.

Plaintiff alleged that defendant Lingle negligently operated his truck, although he had the right of way on a major thoroughfare. Plaintiff's pleadings also alleged that she was confused because the State had negligently designed, constructed and maintained the road.

The trial court granted summary judgment in favor of the State of Utah which was followed by a jury trial in which judgment was granted in favor of the remaining defendants.

STATEMENT OF FACTS

1. On April 16, 1984, the plaintiff, Fay Gaw, pulled out from a stop sign on a side street directly into the path of a semi-tractor trailer travelling southbound on the main highway, State Road 6, near Helper, Carbon County, Utah. Plaintiff's age was not given, but she was elderly: she had eight children and 26 grandchildren. Tr. at 548 and 550. She was familiar with the intersection and had travelled that same route on many occasions. See quotations from the transcript under Point II, below, concerning her familiarity with the intersection.

2. The intersection provided a lane for traffic travelling the path which Gaw intended to travel, that is, for traffic leaving Helper and turning left onto Highway 6. See Trial Exhibits, diagrams of highway. The lane did not even merge into southbound traffic on Highway 6, but went south eventually becoming a lane of its own (hereafter referred to as the "safety lane"). Id. Southbound traffic through the intersection was restricted to one lane. Id. The safety lane eventually joined that single lane of southbound traffic, forming two lanes of southbound traffic and elimination the need for any merging. Id. The safety lane was clearly marked with painted lines. Id. and Tr. at 575 through 576.

3. The day was clear and dry. Tr. at 554 and 566. After having stopped at the stop sign westbound, Gaw proceeded into the intersection but did not turn into the safety lane. Tr. at 655 through 656. She passed the safety lane and appeared, to southbound traffic, to be continuing across the highway to the streets to the west. Tr. at 659. Instead of waiting at the broad median between north and southbound traffic, she began to turn to the south into the southbound lane of traffic on Highway 6. Tr. at 656. The driver of the truck, Jimmy Wray Lingle (hereafter "Lingle"), saw her vehicle pull out from the stop sign, but assumed she was travelling west across the highway and would stop in the safety median and allow him to pass. Tr. at 656 through 657, 659. When he saw that she was not stopping and was attempting to enter his lane of travel, he tried to swerve and applied his brakes. Tr. at 657, 661. He was unable to avoid the accident. Tr. at 660.

4. There was no evidence that plaintiff was faced with any emergency or other justification or excuse for her failing to turn left into the safety lane or justifying her travelling across the painted median lines into defendant Lingle's lane of travel, or her turning into the southbound lane of traffic when it was unsafe to do so.

5. The jury found the defendants, Lingle and Roadrunner Trucking, 25% negligent, and the plaintiff 75% negligent. R. at 1671; Tr. 881. The jury left the damage line on the verdict form blank, indicating their knowledge of the effect of their verdict. R. at 1671; Tr. at 881.

SUMMARY OF ARGUMENT

1. The judgment rendered in the trial court in favor of defendants Jimmy Wray Lingle and Roadrunner Trucking, Inc., should be affirmed because no reversible error was committed by the trial court. Alternatively, if it be determined that error was committed, such error was harmless to plaintiff.

2. Plaintiff Gaw's expert on human factors was allowed to testify on the ultimate issues in the case for which he believed he was qualified, and presented substantial testimony on the reasonableness of conduct of the parties at the intersection where the accident occurred. Plaintiff's expert testified that he was unqualified to render an opinion on whether the conduct of the parties conformed to the "reasonably prudent person" negligence standard. The trial court did not abuse its discretion in preventing plaintiff's expert from testifying in an area where he was without qualification. Utah Rules of Evidence, Rule 702 (1989).

3. The trial court's negligence instructions did not constitute reversible error. It is well established that violation of a statue or ordinance is negligence per se, subject only to justification or excuse. Jorgensen v. Issa, 739 P.2d 80, 82 (Utah App. 1987); Hornsby v. Corp. of the Presiding Bishop, 758 P.2d 929, 934 (Utah App. 1988). Plaintiff presented no evidence establishing a justification or excuse for her failure to conform to law. Plaintiff testified that she had safely negotiated the intersection on several occasions and was not confused by the intersection.

4. Under the trial court's instructions on negligence, and, under the applicable system of comparative fault, the jury was free to assign any percentage of fault up to 100% to each of the parties. In instruction no. 34, for example, the court presented the jury with an example that allocated 25% of the negligence to the plaintiff and the remaining 75% to defendants, a result which would have allowed plaintiff to recover damages, if such had been proven.

5. The jury instructions taken as a whole and not singling out any instruction appropriately advised the jury of the law.

6. Even if the instructions are somehow determined to be error, such error was harmless where the jury was at all times

free to proportion the fault and award plaintiff damages, but felt plaintiff was not entitled to damages.

7. In instruction no. 13, the trial court instructed the jury that it was the duty of both drivers involved in the accident to use reasonable care under the circumstances to avoid danger, keep a proper lookout, keep control of their vehicles, and drive at a safe speed. The trial court clearly instructed the jury that defendant Lingle was to be held to a duty to exercise due care.

ARGUMENT

POINT I

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE TRIAL COURT BECAUSE PLAINTIFF'S EXPERT ON HUMAN FACTORS WAS ALLOWED TO TESTIFY REGARDING THE ULTIMATE ISSUES FOR WHICH HE WAS QUALIFIED AND ON THE REASONABLENESS OF ACTIONS OF THE PARTIES.

Plaintiff Gaw seeks reversal by arguing that her expert was not allowed to testify on what constitutes reasonable, prudent conduct under the legal term. Plaintiff is correct that the trial court requested that her expert on human factors not testify concerning what reasonable, prudent conduct is under the legal term. Tr. at 268. Nevertheless, the trial court's ruling was not error for two reasons: (1) plaintiff's expert, Mr. Slade

Hulbert, testified that he is not trained in the law and is unable to testify regarding the reasonably prudent person, and (2) Mr. Hulbert did testify as to the reasonable conduct of users of the highway at the intersection in question, including the parties hereto.

Rule 702 of the Utah Rules of Evidence provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

It is within the discretion of the trial court to determine the suitability of expert testimony and the qualifications of the proposed expert witness. State v. Clayton, 646 P.2d 723, 726 (Utah 1982). When the expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between the expert's opinion and the facts are established, the expert's opinion on an ultimate issue becomes admissible. Edwards v. Didericksen, 597 P.2d 1328, 1331 (Utah 1979); Martin v. Mott, 744 P.2d 337, 339 (Utah 1987). The background of plaintiff's expert, even in his own mind, did not qualify him to

testify regarding the actions of a prudent person under the legal definition.

Plaintiff complains that the trial court did not allow plaintiff's expert to testify as to the reasonably prudent conduct of plaintiff. Brief of App. at 7. The trial court precluded Mr. Hulbert from testifying about reasonably prudent conduct under the legal term, because Mr. Hulbert clearly indicated during his proffer of proof that he was not qualified so to testify:

> Q (by Mr. DeBry): What does the word reasonable conduct mean to a human factors scientist?
>
> A: Well, I can really only speak for myself; but generally I think that there's a common-fairly common understanding and that is definitely not the legal reasonable man concept. Because we're not trained in the law. Well, some human factors people are, but I am not. It refers and describes behavior that most likely would occur for the persons whose behavior we're analyzing under the circumstances that that behavior occurred. And that behavior may or may not be legal behavior and still would be reasonable, or might well be reasonable even though it might not be necessarily lawful behavior under the law as it would exist at any particular time, because the laws change, and human behavior doesn't.

Tr. at 238:19 through 239:6 (emphasis added). The expert stated he could determine some reasonable conduct, but not reasonably "prudent" conduct:

> Q: You stated that you cannot - with respect to Mrs. Gaw, that you do not determine what a reasonably prudent person does, but what Mrs. Gaw. Now does that apply also to Mr. Lingle, that you could analyze his personal actions but not the actions of a reasonably prudent person under the circumstances? Is that -
>
> MR. DEBRY: I object to that question, your Honor. The objection - its asking the witness to comment on the legal standard. And he's not a lawyer, he's asking him to interpret the legal -
>
> THE COURT: Well, objection overruled. Let's see if he can answer.
>
> THE WITNESS: Well, I avoid using the term prudent and negligent in regard to behavior because those are legal terms of art as I understand it but the answer to your question, if I may - if I can edit out the word prudent, yes.

Tr. 256:2 through 16 (emphasis added). By his own admission, plaintiff's expert was unable and unqualified to testify regarding reasonably prudent behavior, and by its ruling the trial court simply allowed only the testimony for which the witness felt he was qualified to be given and prevented the jury from being misled. The court did not prevent Mr. Hulbert from testifying on any issue for which he was qualified, but only from

testifying to a legal term which he admitted he did not understand.

The court did allow the expert to testify as to the general reasonableness of plaintiff's actions as he understood the term reasonable. Beginning at page 286 of the trial transcript, Mr. Hulbert considers the reasonableness of plaintiff's actions and of other drivers using the highway at the intersection in question. In answer to questions of plaintiff's counsel, Mr. Hulbert testified:

> A: . . . so initially attention of any such motorist, including Mrs. Gaw, would be directed typically to the left . . . then Mrs. Gaw, . . . and many motorists would do the same at this location, would proceed into the intersection, at which time the next task for such a motorist is to determine there is no threatening traffic coming from the right . . . And because of the configuration of this particular roadway intersection, there's a very high task load on such a driver.

Tr. at 287:2 to 12 (emphasis added). He further testified:

> A: . . . The result of that is that until a motorist is out in this area, (indicating) where Mrs. Gaw must have been at one point in time before the crash, as any other motorist using the intersection would be out in this area . . . it's not possible to see where the wheels of that vehicle approaching are contacting the road surface.

Tr. at 288:1 to 8 (emphasis added). Mr. Hulbert continued:

> A: . . . so these two aspects of the original scene contributed to an unusually high task load for any user of this intersection, including Mrs. Gaw.

Tr. at 289:24 through 290:1 (emphasis added). Plaintiff's expert clearly explained the various effects of the intersection on any driver, including plaintiff.

Plaintiff's contention that her expert was prevented from testifying whether her conduct was reasonable does not comport with the evidence in other regards. Mr. Hulbert discussed in detail the markings on the highway, the sloped nature of the highway, the crown of the hill which allegedly obscured plaintiff's view, the effects of parallax, and other aspects of the intersection which impacted plaintiff. Tr. at 286 through 293. After testifying at length regarding the effects of the intersection on an ordinary driver, Mr. Hulbert stated that plaintiff Gaw may not have been aware of the safety lane:

> A: . . . so the best I can understand is it's very, very likely - of course, I can only deal in likelihoods. I can't tell you what happened in Mrs. Gaw's mind. Nobody can. But in a great high percentage, much greater than fifty-fifty, based upon her behavior as an interpretive guide in reconstruction theory, Mrs. Gaw was not aware that she had this safe movement available to her (indicating).

Tr. at 291:13-20. See Point II, below for page citations to plaintiff's own testimony that she was familiar with the safety lane. The questioning continued:

> **Q:** Could she have been misled or confused about the speed or distance of the oncoming truck?
>
> **A:** Oh yes, I went into that earlier.

Tr. at 292:18 through 20.

Plaintiff also complains that Mr. Hulbert was not allowed to testify regarding the actions of defendant Lingle. However, at no time did the trial court restrict Mr. Hulbert's ability to give testimony with respect to defendant Lingle.

The trial court did not misunderstand the law. The only testimony it prevented plaintiff's expert from giving was testimony regarding the actions of a prudent person, testimony which the expert himself admitted he was unqualified to give. Tr. at 238:19 through 239:6. The discretion placed in the trial court clearly was not abused and should not be overturned.

POINT II

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE TRIAL COURT BECAUSE 1) THE TRIAL COURT'S NEGLIGENCE PER SE INSTRUCTIONS WERE APPROPRIATE AS A MATTER OF LAW AND THE JURY WAS AT ALL TIMES FREE TO ASSIGN UP TO 100 PERCENT OF THE NEGLIGENCE TO DEFENDANTS, 2) NO EVIDENCE EXISTED JUSTIFYING OR EXCUSING THE FAILURE OF PLAINTIFF TO COMPLY WITH THE LAW, AND 3) THE PLAINTIFF SOUGHT NO INSTRUCTION ON JUSTIFICATION OR EXCUSE.

Plaintiff Gaw characterizes three of the negligence instructions given by the trial court to the jury as per se negligence instructions and argues that the failure of the trial court to instruct on prima facie negligence was prejudicial error. Plaintiff is mistaken. The three negligence instructions to the jury were clearly appropriate under present Utah law.

In Jorgensen v. Issa, 739 P.2d 80 (Utah App. 1987), this Court reviewed a jury verdict which found plaintiff and defendant each 50% negligent in a traffic accident, which denied recovery to plaintiff under Utah's comparative negligence system, Utah Code Ann. §78-27-38 et seq. (1987). Plaintiff appealed, claiming the trial court erred by refusing to allow a jury instruction on justification or excuse after the court agreed to allow a negligent per se instruction. Jorgensen, supra. The trial court instructed the jury on the duty of a driver to use reasonable care to keep a proper lookout, keep his vehicle under control,

and drive at a safe speed. Jorgensen, 739 P.2d at 81 n.1. The trial court concluded that instruction as follows:

> Failure to operate his vehicle in accordance with the foregoing requirements of the law would constitute negligence on his part.

Jorgensen, supra. The trial court refused to give the following instruction on justification or excuse:

> A violation of such a statute or duty by a driver may be subject to justification or excuse if the driver's conduct can nevertheless be reasonably said to fall within the standard of reasonable care under the circumstances. The following facts may be considered in determining whether a driver is excused or justified in violating a statute or duty:
>
> A. The driver is unable after reasonable diligence or care to comply with the statute or duty; or
>
> B. He is confronted by an emergency which was not caused by his own misconduct; or
>
> C. Compliance would involve a greater risk of harm to the driver or to others.

Jorgensen, 739 P.2d at 82.

On the question of whether the trial court erred in failing to submit the above instruction to the jury, this Court specifically held that negligence per se instructions are appropriate:

> [I]t is well established that violation of a statute or ordinance is negligence per se

> which may be excused if the negligent actor is confronted with an emergency not his own fault. Hall v. Warren, 632 P.2d 848, 851 (Utah 1981); RESTATEMENT (SECOND) OF TORTS §288A (1965).

Jorgensen, supra. Explaining that in order for a justification or excuse theory to apply, a statute or ordinance must have been violated, this Court observed that the jury had not been instructed on violation of a statute, and the facts did not indicate that plaintiff had violated a statute or ordinance. Jorgensen, supra. This Court held that the instructions given on the reasonable person standard referred to above, presented the jury with the appropriate standards for determining whether or not plaintiff was negligent. Jorgensen, supra. The trial court had instructed the jury that the failure by defendant to comply with the "requirements of the law would constitute negligence on his part." Jorgensen, 739 P.2d at 81 n.1 (emphasis added). This Court explained that the finding of negligence took into account all circumstances of the case, including the fact that plaintiff was suddenly confronted with defendant's vehicle straddling the center line just prior to the accident, and affirmed the jury verdict denying recovery. Jorgensen, 739 P.2d at 82. The negligence per se instructions were proper.

In Hornsby v. Corp. of the Presiding Bishop, 758 P.2d 929, 934 (Utah App. 1988), this Court held that plaintiff was not entitled to an instruction on negligence per se but only because it was clear no violation had occurred. This Court did not rule that a negligence per se instruction was inappropriate; on the contrary, this Court articulated exactly the opposite view, citing to its holding in Jorgensen: "Violation of a statute or ordinance is negligence per se." Hornsby, supra. As in Jorgensen, where the facts failed to reveal a violation of statute by plaintiff and made his requested instruction unnecessary, this Court in Hornsby refused plaintiff's requested instruction for the same reason. Hornsby, supra. It is clear that this Court will not upset the discretion of a trial court which gives a jury instruction justified by the facts and accurately reflecting the law.

Plaintiff's characterization of the three jury instructions in question as negligence per se instructions is completely unavailing. Violation of a statute or ordinance in Utah is negligence per se. Jorgensen v. Issa, 739 P.2d 80, 82 (Utah App. 1987); Hornsby v. Corp. of the Presiding Bishop, 758 P.2d 929, 934 (Utah App. 1988). Plaintiff's claim that Utah has never adopted the per se rule is clearly incorrect. In support of her

claim, plaintiff cites to several cases which were decided prior to the tort reform which occurred in Utah in April, 1986, codified at Utah Code Ann. §§78-27-37 to -43 (1987). Prior to such tort reform, an instruction that an act of one of the parties constituted negligence would have been, in most cases, dispositive with respect to that party. Under the present Utah comparative negligence system, regardless of whether such an instruction is given, the jury in rendering its verdict is always free to ascribe whatever percentage of fault it deems appropriate to each party.

Plaintiff cites to Thompson v. Ford Motor Co., 395 P.2d 62, 63-64 (Utah 1964), to support its position that negligence per se instructions are inappropriate. The trial court had ruled that the plaintiff was contributorily negligent as a matter of law and granted defendant's motion for summary judgment. Thompson, 395 P.2d at 63. In 1964, however, when the Supreme Court of Utah addressed that appeal, a finding of contributory negligence on the part of plaintiff would entirely prohibit recovery. The Court reversed the summary judgment and, because negligence was an all-or-nothing proposition in Utah at the time, held that violation of a statute was to be regarded as prima facie evidence of negligence, subject to justification or excuse "if the

evidence is such that it reasonably could be found that the conduct was nevertheless within the standards of reasonable care under the circumstances." Thompson, 395 P.2d at 64. All of the cases cited to by plaintiff were decided prior to tort reform and hold simply that evidence of negligence is subject to justification or excuse "if the evidence is such that it reasonably could be found." Intermountain Farmers Ass'n. v. Fitzgerald, 574 P.2d 1162, 1165 (Utah, 1978); see also Hall v. Warren, 632 P.2d 848 (Utah 1981). Prior to institution of the comparative system in Utah, violation of a statue or ordinance was considered prima facie evidence of negligence, subject to justification or excuse, to promote justice by protecting a party from being thrown completely out of court when the exercise of due care itself prevented him from conforming to statutory law.

As articulated by this Court in Jorgensen and Hornsby, supra, the same result is accomplished under the present comparative system when the jury weighs the actions of all parties and allocates a percentage of negligence or fault to each. When the trial court in the present case informed the jury that failure to operate a vehicle in accordance with the law as explained, was negligence on the part of the driver, it was in no way restricting the jury from allocating the fault as it saw fit.

The jury remained free to consider all the circumstances of the case and allocate the appropriate percentage of fault to each of the parties. The jury was free to attribute any percent of the negligence to plaintiff. The trial court even provided the jury with an example which apportioned only 25% of the negligence to plaintiff and apportioned 75% to defendants. Tr. at 818. The trial court instructed the jury that if such was the jury verdict, plaintiff would be entitled to recover 75% of her damages. Tr. at 818. The trial court had previously instructed the jury that it was the jury's exclusive province to determine the facts in the case and weigh the evidence. Tr. at 804. The trial court instructed the jury that if it found plaintiff negligent in causing her own injuries it was to assign a percentage "to that portion of the responsibility for plaintiff's injuries falling on the plaintiff, <u>if any</u> . . . ." Tr. at 818 (emphasis added). Having been advised to consider the instructions as a whole, the jury was clearly not misled contrary to the law. The trial court then provided the jury with a Special Verdict form to aid the jury in apportioning fault and arriving at a verdict. Tr. at 821-823. The jury returned a verdict ascribing 25% of the negligence to defendants and 75% of the negligence to plaintiff. Tr. at 881. The jury also did not

even put a monetary figure into the space for damages, clearly indicating it felt plaintiff should and would get nothing as a result of their allocation of negligence. R. at 1671; Tr. 881.

As noted above, the Supreme Court of Utah and this Court have emphasized in cases similar to the case now before the Court that all of the circumstances of the case must be considered in deciding a negligence claim.

Plaintiff argues that negligence on the part of plaintiff is subject to justification or excuse. But that is only true if there is some evidence of justification or excuse and the plaintiff seeks such an instruction. Justification and excuse were certainly considered when the jury weighed all the circumstances, apportioned negligence, and rendered its verdict below. However, and it is borne out by the verdict, plaintiff failed to present evidence of appropriate justification or excuse to the court. In her brief, plaintiff states that there was a high probability that she was not aware of a safe manner of negotiating the intersection, she only did what would have been typical for other drivers using the intersection, and her conduct was reasonable in view of the confusing pavement markings. Brief of App. at 12. However, her brief belies her testimony.

In plaintiff's testimony at trial, part of which was read from her deposition, she stated that she was quite familiar with the intersection in question including the painted lines, the safety island or median and the safety lane, and had been for 15 years:

> Q: And you drove through this area?
>
> A: Quite a few times, I couldn't say how many times a year or when, but we used to go up there shopping a lot.
>
> Q: Can you give me some idea what you mean by a lot?
>
> A: Maybe a couple of times a month and we'd miss a month and go a couple of times again.
> . . .
>
> Q: 15 to 20 times a year, would that be correct?
>
> A: Approximately, yes, like that.
>
> Q: And this was over a 15 year period?
>
> A: Yeah.
>
> Q: Would it be correct to say then you were quite familiar with the intersection?
>
> A: Yes, I was quite familiar with the whole city of Helper, all around.

Tr. at 599 through 600. She continued:

> Q: Again, you testified that you have been on that road frequently.
>
> A: Oh, yeah.

> **Q:** Every year for quite a number of times for 15 years.
>
> **A:** Uh-huh (affirmative).

Tr. at 600. See also page 600 lines 11 through 16. She also stated:

> **Q:** How about 1983, how many times would you have driven it in 1983, and driven versus being a passenger?
>
> **A:** I had driven it quite a bit. Like I say, my husband had a stroke, so I did the driving.

Tr. at 593. She was familiar with the safety lane which was inappropriately referred to by counsel as a merge lane because it did not actually merge but became a lane of its own:

> **Q:** And east of that lane, I guess, is this left hand merge lane that vehicles from your position would have turned into and then eventually merged into through traffic?
>
> **A:** Right.

Tr. at 596. In the past she had always used the "merge" lane with which she was familiar:

> Q: So you turn left, and there is a merge lane that takes you over to the southbound?
>
> A: Uh-huh (affirmative).
>
> **Q:** On the date of the accident, did you use that merge lane?

A: Well I always did before, but, sir, I don't know, I can't remember. . . .

Tr. at 585:17-20. She continued:

Q: . . . You had driven this route on prior occasions, made the left turn lane going southbound?

A: Right.

Q: And you had used the merge lane?

A: Right.

Q: And you were aware that that merge lane existed?

A: Right.

Tr. at 586. Later she testified:

Q: What you are telling me, then, is that you do not know whether you used the merge lane that you used on prior occasions in driving this same route on the day of the accident?

A: I always had before, so why would I change it for one time?

Tr. at 585 through 586. She clearly testified that she was not confused on the day in question, and had never been before by the lines or markings on the road:

Q: . . . At this time, okay, do you have any memory or do you feel that you were confused by any of these lines in this intersection?

A: Not that I remember. There was - they didn't even bother me before. . . .

Tr. at 597. Earlier she had stated:

> Q: Is there anything about the intersection markings or signs that you were unable to understand?
>
> **A:** Well you really just had to watch what you're doing and stay in your lane and watch where you're going.

Tr. at 587. She was also not confused by some changes made in the lines:

> Q: . . . [Y]ou indicated that the lane marking had changed, but that you have been aware of those changes . . .
>
> A: Yeah.
>
> Q: - What the lanes were supposed to convey to the motorist?
>
> A: Yeah.

Tr. at 598.

Restatement (Second) of Torts §288A (1965) enumerates the following defenses to negligence based on a violation of statute:

> 1. The violation is reasonable because of the actor's incapacity;
>
> 2. The actor neither knows nor should know of the occasion for compliance;
>
> 3. The actor is unable after reasonable diligence or care to comply;
>
> 4. The actor is confronted by an emergency not due to his own misconduct; and

5. Compliance would involve a greater risk of harm to the actor or to others.

Clearly, the "justification or excuse" alleged by plaintiff at page 12 of her brief is insufficient and is not found in the categories suggested by the Restatement (Second) of Torts §288A (1965) or in the evidence. There was no evidence of incapacity, lack of knowledge, inability, emergency or risk of harm. Plaintiff's argument that if the jury believed plaintiff's version of the evidence it could easily have found justification or excuse for her conduct is not warranted by the evidence. It also ignores the trial court's charge to the jury. The jury had the option to return a verdict proportioning any amount of fault it saw fit to plaintiff. It was so instructed. Tr. at 817-823. It chose not to do so.

It is clear that plaintiff failed at any time to request an instruction from the trial court on the principle of justification or excuse. See plaintiff's proposed instructions, Tr. at 1594 through 1596. It is likely that plaintiff was aware that little if any evidence on either principle had been presented to the Court. Plaintiff may also have realized that an instruction on justification or excuse was surplusage given that the jury would weigh all the facts in apportioning negligence to the parties. Had plaintiff complied with law no harm would have

occurred to anyone. The instructions on negligence were appropriate as given.

Assuming, arguendo, that it is determined the instructions were given in error, any such error was harmless to plaintiff. The jury was given several examples of appropriate verdicts in the case, two of which would have allowed plaintiff to recover. Tr. at 818. The jury was instructed that it was within its sole province to apportion fault and render a verdict. Tr. at 804, 817-823. The verdict returned by the jury found plaintiff 75% at fault and respondent 25% at fault in the accident. The judgment of the trial court should be affirmed.

POINT III

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE TRIAL COURT BECAUSE THE TRIAL COURT CLEARLY INSTRUCTED THE JURY THAT DEFENDANT LINGLE OWED A DUTY TO EXERCISE DUE CARE UNDER THE CIRCUMSTANCES.

Plaintiff argues that instruction 14, which was presented to the jury on the law of the right-of-way, is incomplete in failing to advise the jury of the duty of the "favored driver" to exercise due care. Despite the protest of plaintiff, it is clear that the instruction is perfectly appropriate, even if it were standing alone. The instruction does not speak of "favored drivers" vs. "disfavored drivers," but explains simply that when

the driver of one vehicle should reasonably apprehend an immediate hazard, she should immediately yield the right-of-way to a second vehicle apprehended as the hazard. The instruction applies to defendant Lingle as well as plaintiff.

Plaintiff is correct that one who possesses the right-of-way may not exercise it when a reasonable person possessing the right-of-way would see and avoid a danger. Plaintiff concedes that defendant Lingle possessed the right-of-way under the circumstances and labels defendant Lingle the "favored driver." Yet plaintiff ignores the fact that the trial court was extremely thorough in describing the duties owed by both drivers, plaintiff and defendant. In instruction no. 2, the trial court informed the jury that it was "to consider all the instructions as a whole and to regard to each in the light of all the others." Tr. at 805. In instruction no. 8, the trial court informed the jury that negligence is the failure to do what a reasonable and prudent person would have done under the circumstances. Tr. at 807. In instruction no. 10, the trial court advised the jury that ordinary care is that degree of care which a reasonably prudent person would use under the same or similar circumstances. Tr. at 808. The trial court then instructed the jury, in instruction no. 13, that:

> It was the duty of the drivers of the vehicles involved in the accident to use reasonable care under the circumstances in driving their vehicles to avoid danger to themselves and others and to observe and be aware of the condition of the highway, the traffic thereon, and other existing conditions.

Tr. at 809 (emphasis added). The trial court explained that respondent Lingle was obliged to keep a proper lookout, keep control of his vehicle, and maintain a safe and reasonable speed. Tr. at 809. The court then stated that the failure of a driver to carry out any one of the above duties would constitute negligence. Tr. at 810.

In light of the above instructions plaintiff's point that the trial court failed to properly instruct the jury on defendant Lingle's duty of due care is groundless. The trial court emphasized the fact that both drivers involved in the accident were operating under a duty to exercise due care under the circumstances. Tr. at 809. When the members of the jury retired to deliberate, it was abundantly clear to them that they were required to weigh the negligence of both parties, including defendant Lingle. The verdict returned by the jury expressly finds defendant Lingle negligent and attributes 25% of the fault in the accident to him. The instructions describing the laws of

right-of-way and negligence were entirely proper, and the verdict returned by the jury should be affirmed.

CONCLUSION

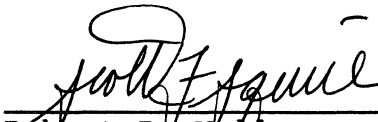
The judgment rendered in the trial court in favor of defendants Jimmy Wray Lingle and Roadrunner Trucking, Inc. should be affirmed, because no reversible error was committed by the trial court. If it be determined that error was in fact committed, such error was harmless to plaintiff as explained above. Plaintiff's expert on human factors was allowed to testify on all ultimate issues for which he believed he was qualified, and he presented substantial testimony on the reasonable conduct of plaintiff and general users of the intersection where the accident occurred. The trial court's instructions, that failure to operate a vehicle in accordance with the law as explained, was negligence, were proper and allowed the jury to assign any percentage of fault to each of the parties. Since the advent of the comparative negligence system in Utah, this Court has held a violation of statute to be negligence per se, subject only to justification and excuse. The plaintiff sought no instruction on justification or excuse, and no evidence existed supporting such a defense or instruction. Finally, the trial court carefully instructed the jury that it

was the duty of both drivers involved in the accident to use reasonable care under the circumstances.

For the above reasons, respondents respectfully request that the Court affirm the judgment of the trial court and deny plaintiff any reversal, remand, recovery, or other relief herein.

RESPECTFULLY SUBMITTED this 18th day of September, 1989.

HANSON, EPPERSON & SMITH



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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 1989, I caused four true and correct copies each of the foregoing Brief of Respondent to be mailed, postage prepaid, to the following:

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IN THE UTAH COURT OF APPEALS

FAY GAW,

Appellant,

vs.

STATE OF UTAH, et al.,

Respondents.

CATEGORY 14 B

BRIEF OF RESPONDENTS

Case No. 890139-CA

APPEAL FROM JURY VERDICT IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY, HONORABLE BOYD BUNNELL, PRESIDING, AND A RELATED APPEAL FROM A GRANT OF SUMMARY JUDGMENT

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DETERMINATIVE CASES, RULES AND STATUTES

1. CASES.

a. State v. Clayton, 646 P.2d 723, 726 (Utah 1982).

> It is within the discretion of the trial court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert.

b. Jorgensen v. Issa, 739 P.2d 80, 82 (Utah App. 1987).

> [I]t is well established that violation of a statute or ordinance is negligence per se which may be excused if the negligent actor is confronted with an emergency not his own fault. Hall v. Warren, 632 P.2d 848, 851 (Utah 1981); RESTATEMENT (SECOND) OF TORTS § 288A (1965).

c. Hornsby v. Corp. of the Presiding Bishop, 758 P.2d 929, 934 (Utah App. 1988).

> Violation of a statute or ordinance is negligence per se. Jorgensen v. Issa, 739 P.2d 80 (Utah App. 1987).

2. RULES.

Utah Rules of Evidence, Rule 702 (1989) (emphasis added).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

3. STATUTES.

a. Utah Code Ann. § 78-27-38 (1987).

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

b. Utah Code Ann. § 78-27-39 (1987).

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

DATED this 19th day of September, 1989.

HANSON, EPPERSON & SMITH

Scott F. Squire

SCOTT F. SQUIRE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, this 19th day of September, 1989, a true and correct copy of the foregoing Determinative Cases, Rules and Statutes to the following:

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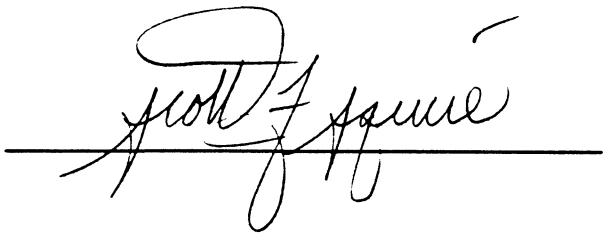

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